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No. 89-558

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

JOHN P. GREY, Petitioner

v.

THE FIRST NATIONAL BANK OF CHICAGO
and DANIEL J. WROBLEWSKI, Respondents

ON WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT

REPLY BRIEF FOR THE PETITIONER

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JURISDICTION

The Petitioner sought jurisdiction of this court under Sec 1651 of Title 28, United States Code.

Petitioner also cited two cases supporting his contentions that this Court has a right to review this matter:

(1) *Easton v. Iowa*, 188 US 220 at 221; and

(2) *Davis v. Elmira Savings Bank*, 161 US 275 at 283.

The petitioner is not an attorney, nor experienced in Supreme Court rules or procedures. Compounding this fact, the petitioner was ill suffering with a bronchial infection from September 30 through October 16 of 1988 and received treatment for the aforementioned illness from his physician.

Furthermore, petitioner was confined to his home from early December of 1988 through January of 1989 after he sustained an injury as a result of his fall from a CTA bus. (Application for Extension).

Despite the aforementioned illness and injury, the petitioner has made every effort possible to prepare the Writ for Certiorari for this Court in conformance with it rules and regulations,and therefore, wishes to exercise his right as a U.S. citizen to have this matter reviewed by the highest court in the land.

28 USC Sec 1651 provides :

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by of justice or judge of a court which has jurisdiction.

The petitioner thus prays that every consideration be given to an alternative writ if Sec 1651 (a) does not apply, as may be proscribed by Sec 1651 (b), in order that the opinion of the Illinois appellate court may be reviewed and reversed.

PREFATORY ARGUMENT

The respondents have claimed that the "[p]etitioner has advanced no reason why this Court has jurisdiction to review the judgments of the Illinois Supreme Court and the lower courts in this case ". . . and that "[i]n absence of any claim that the decisions of its courts are repugnant to the United States Constitution or the laws of the United States, the Illinois courts have absolute autonomy to create and define the elements of their tort remedies." (Resp. Brief in Opp. page 14).

Such claims are valid where there is no infringement by the states upon the national government. However, where states exercise their authority to interfere with national banks, by special laws, whether with hostile or friendly intentions, it is without lawful power to make such laws applicable to banks organized and operated under the laws of the United States.

The effect of the judgment of the Illinois state courts in having "recognized" the criminal activity of a national bank as "unavoidable aspects of employment renders" undermines and renders null and void the following criminal statutes of the United States:

18 USC Sec. 4, Misprison of felony;

18 USC Sec. 1503. Influencing or injuring an officer, juror or witness generally;

18 USC Sec. 1510. Obstruction of criminal investigations;

18 USC Sec. 1512. Tampering with a witness, victim or an informant;

18 USC Sec. 1513. Retaliating against a witness, victim or an informant;

18 USC Sec. 1621. Perjury generally ; and

18 USC Sec. 1622. Subornation of perjury

(See Pet. for Cert. pages A-13 to A-17)

ARGUMENT

I.

Managerial decisions by National Banks to commit crimes of perjury in Federal courts of law, and disciplinary actions instituted by such National Banks in order to retaliate and deter its employees, whom are witnesses to its crimes, are repugnant to Federal laws and must not be recognized as "unavoidable aspects of employment" as ruled by the Illinois Appellate Court.

Although the petitioner's complaint is one based in common state law, the elements, contained therein have been identified as crimes committed by a National Bank through its managerial departments and legal departments.

The charges proffered by the petitioner in his complaint, and arguments presented at trial, appellate and the state supreme court levels have consistently enunciated that **The First National Bank of Chicago** (which is an agency of the Federal Government) **committed crimes of perjury** in a **Federal Court of Law** in California in an effort to cover up the negligent loss of customer assets amounting to $160,000.00, (Pet. for Cert. pages 4, 5 and A-5), punishable under 18 USC Secs. 1621, 1622.

In addition, the petitioner has argued that **The First National Bank compounded its crimes by** continually **misleading** the petitioner, **a witness** to its crimes, into believing that an internal investigation regarding his allegations and proofs thereof were under way when, in fact, no such investigation was ever undertaken (Pet. for Cert. page 7), punishable under 18 USC Sec. 4.

Furthermore, the petitioner has alleged and argued that **The First National Bank of Chicago** - through its managerial

staff - **did punish and deter the petitioner from reporting such crimes** to the proper authorities[1] to prevent its reputation from being "tainted," by **knowingly causing the petitioner to suffer from nervous breakdowns** which ultimately resulted in his contracting severe mental depression, (Pet. for Cert. pages 6 - 16), punishable under 18 USC Secs. 1503, 1510, 1512, 1513.

The right to inform authorities of violations of federal crimes is, not only established under federal law, but is well founded in decisions of this Court. In *Re John M. Quarles*, this Court stated that: "The ***right*** of a citizen informing a violation of law. . . does not depend upon any amendments to the Constitution, but ***arises out of the creation*** and establishment by the Constitution itself ***of a national government***, paramount and supreme within its sphere of action." (Emphasis added). Id. 158 U.S. 532 at 536.

Justice O'Connor (a Justice of this Court) wrote, in citing this Court's decision in *Stone v. Powell*, 428 US 465 (1976), that: "***State courts***, like federal courts ***have a constitutional obligation*** to safeguard personal liberties and ***to uphold the federal law.***" 35 Case Western Reserve Law at page 10. (Emphasis added) See also *Martin v. Hunter's Lesse*, 1 Wheat. 304, 341-344 (1816).

To this end, the Illinois appellate courts have failed miserably! For, the retaliatory acts of an employer directed against its employee because he is a witness to its crimes and because he attempts to insist on his employer's compliance with federal law (in this case a national bank's compliance with perjury laws in a federal court), are recognized by state courts simply as an "unavoidable aspect of employment."

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[1] The petitioner did, in fact, notify the Securities & exchange Commision of his findings of First National's perjury in a federal court in California, (Pet. for Cert. page 10) but was deterred from reporting the same because he ultimately suffered from episodes of severe mental depression as the result of nervous breakdowns (Pet. for Cert. page 10).

The Illinois courts have indeed sent a clear message to citizens of this state. " If you aware of a crime committed by your employer - be it a National Bank or Federal Savings & Loan Association - keep your mouth shut, so you can keep your job and your health!"

II

A state court's recognition (by decisions in common law) of the criminal activities of a national bank as "unavoidable aspects of employment" is an interference by that state into affairs of the national government over which it is without lawful power to decide.

When the Illinois appellate court ruled in favor of the respondents in this case, it stated that:

> " The [state] courts have recognized that questioning of job performance and personality conflicts are unavoidable aspects of employment; however, such stress cannot form the basis of the tort of intentional infliction of emotional distress or virtually (sic) employee would have a cause action."
>
> (Pet. for Cert. at page A-12)

The reasoning of the appellate court for its finding was based on another similar case, where an employee, who was a witness, was punished for reporting a suspected embezzlement. *Harris v. First Federal Savings & Loan Association of Chicago* (1984), 129 Ill. App. 3d 978, 473 N.E. 2d 457.

In that case, the same state appellate court ruled that:

> "Personality conflicts, questioning of job performance and job transfers, whether for disciplinary or management purposes, are unavoidable aspects of employment," citing *Heying v. Simonaitis* 126 Ill. App. 3d 157, 466 N.E. 2d 1137 (1st Dist. 1984).
>
> (473 N.E. 2d at 459)

The petitioner contends, however, that managerial decisions by National Banks to commit crimes of perjury in Federal Courts of law, and disciplinary actions instituted by such Banks to punish and deter employees who are witnesses to their crimes **must not be** "unavoidable aspects of employment" as recognized by the Illinois appellate courts, as such "recognition" by state courts grants legal deference to National Banks, not only to commit crimes within the Federal court system, but to defraud customers of moneys (by concealment) lost through their negligence in claims in a federal court of law.

Furthermore, the fact that a "personality conflict" arises because of National Bank's management decision and determination in pursuing its criminal course of conduct, should not preclude an employee (who is a witness to its crimes) from seeking a cause of action for the intentional infliction of emotional distress.

There is no doubt that a personality conflict arose in *McGrath v. Fahey*, between the two litigants when those "parties subsequently accused each other of fraud." Id. 126 Ill. 2d 78 (Pet. for Cert. at page A-11).

And yet, this element did not preclude the plaintiff, McGrath from establishing a cause of action for the intentional infliction of emotional distress.

In addition, the appellate courts have always made a determination as to the "legal rights" of the defendant in tort actions for infliction of emotional distress and retaliatory discharge.

The appellate court, in the opinion of this case, agreed with *McGrath* court ". . .that the bank had **no legal right** to withhold the certificates, dishonor the drafts drawn on the accounts, or apply as a setoff against plaintiff's alleged liability the funds that plaintiff held as trustee for third parties." (Emphasis added) Pet. for Cert. at A-12.

In *Milton v. Illinois Bell Telephone Co.* (where the employer made repeated demands that its employee falsify work reports and the retaliated against him for not doing so) the appellate court found that ". . . the complaint . . . [did] not show a defendant [that was] exercising its **legal rights**" . (Emphasis added) *Milton v. Illinois Bell Telephone Co.*, 101 Ill. App. 3d 75.

In *Gibson v. Chemical Card Services Corp.* 157 Ill. App. 3d 211 (1984), in finding that no cause of action had been adequately alleged, the court, placed heavy emphasis on the **legitimacy** of the employer's objectives, stating:

> "[The defendant company] had a legitimate interest in solving prior employee thefts and preventing future thefts."

Id. 157 Ill. App. 3d 211 (1984)

This standard (of examining the "legal rights" of an employer) in intentional infliction of emotional distress cases was well established by the Illinois supreme court, and has been consistently followed by appellate courts in their decisions as heretofore stated.

The Illinois supreme court held in *Public Finance Corp. v. Davis*, in evaluating the conduct of an employer in emotional distress cases, that the proper rule is that "the actor is not liable 'where he has done no more than to insist upon his **legal right** in a permissible way, even though he is aware that such insistence is certain to cause emotional distress'" (Emphasis added) *Public Finance Corp. v. Davis*, 66 Ill. 2d 85.

And yet, astonishingly enough, the Illinois appellate court not only failed to to acknowledge the criminal conduct of the First National Bank, but recognized such activity as "unavoidable aspects of employment!"

In the case before this Court, the respondents were well aware that the plaintiff had a "fear" of contracting high blood pressure because of the fatalities that befell his parents as the

result of contracting high blood pressure.

Nevertheless, aware of the fact that the petitioner began to suffer from high blood pressure as a result of its conduct, the First National Bank of Chicago (through its officers and managers) pursued a course of conduct against the petitioner by repeated threats of discharge because he had reported perjury, subornation of perjury and a cover-up of the significant loss of customer assets in a federal court action.

Furthermore, the First National Bank, continued a course of harassment which was intended to, not only to harm the petitioner, but to harm his mother (whom they knew had suffered two heart attacks) by requiring her to secure further evidence for the proof of purchase of new shoes, and thereafter denying the petitioner time, after work, to take his mother to see a doctor for her injuries because petitioner"s job was made to depend on producing this ridiculous proof.

As a result of the foregoing, petitioner suffered a nervous breakdown - a fact, not only known by respondents, but documented by them in memorandum to their medical staff.

All the while, the plaintiff was subjected to vituperative outbursts, and even a physical battery when his supervisor poked his finger into plaintiff's chest while accusing him of being a thief.

The First National Bank succeeded in preventing its reputation being "tainted" by continually misleading the petitioner into believing that an investigation was underway concerning his findings as to perjury (when in fact, no such investigation was ever contemplated) and ultimately deterred him from reporting its crimes by causing petitioner to suffer from numerous nervous breakdowns resulting in severe mental depression.

Compounding the situation, during the course of seven months, the petitioner was repeatedly asked to work under the very attorney he alleged committed perjury (including subornation of perjury) in a federal court in California, and to work

on class action assignments that included the accounts that contained perjured documents.

The Illinois state appellate courts have totally ignored the criminal retaliation against employees of federal agencies (National Banks and Federal Savings & Loan Associations), and have ruled that the conduct directed against an such employees for reporting its crimes are "unavoidable aspects of employment."

This, in effect, grants legal deference to a federal agency to commit crimes, and constitutes an intrusion into affairs that are of national concern.

This Court has stated that: "***National Banks are*** instrumentalities of the Federal government, created for a public purpose, and as such necessarily ***subject to the paramount authority of the United States***. It follows that an attempt, by a State to define their duties or control the conduct [in this case recognize their criminal activities as "unavoidable aspects of employment"] of their affairs is absolutely void, wherever such attempted exercise of authority expressly conflicts with the laws of the United States, and either frustrates the purpose of the national legislation or impairs the efficiency of these agencies of the Federal government to discharge the duties, for the performance of which they were created." (Emphasis added) *Davis v. Elmira Savings Bank*, 161 US 275 at 283.

There is little doubt that the First National Bank of Chicago embraces the decision of the state court in this matter, as it ratifies its criminal conduct.

However, such decisions, if allowed to stand, will not only tend to encourage National Banks to maintain the mechanism they now have in force with which to deal with such "misguided

employees,"(while sending other employees[2] a clear message), but may also encourage other employees[3] to follow its example.

In Retaliatory discharge cases, the Illinois Supreme Court has encouraged the reporting of crimes, and has stated that "[P]ublic policy favors the exposure of crime, and the cooperation of citizens possessing knowledge thereof is essential to the effective implementation of the policy . . . and [employees] ***should not be deterred from reporting them . . . by fears of discharge.***" Emphasis added. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124 at 132, 133

Appellate courts have reasoned that "if an employer can ***obtain resignations from weaker willed . . . employees*** in order to retaliate against them for exercise of rights involving public policy by ***threatening discharge***, even by implication, the remedy promulgated by the retaliatory discharge doctrine can be significantly impaired." Emphasis added. *Hinthorn v. Roland's of Bloomington, Inc.* 151 Ill. App. 3d at 1008.

The appellate courts in Illinois have recognized that:

"The extreme and outrageous nature of the conduct may arise not so much from what is done as from abuse by the defendant of some relationship position which gives him actual or apparent power to damage the plaintiff's interests. The result is something very much like extortion," (*Prosser on Torts* sec 56 (4th ed. 1971}; accord. *Restatement (second) of Torts sec. 46,*

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2 Where an enployee of the First National Bank of Chicago, Otis Wilson, convicted of conspiring with others to defraud the First National Bank of Chicago of more than $70,000,000.00 from the First National and admitted on appeal that his ". . . mistake was not coming to the authorities sooner." U.S.A. v. Otis Wilson, On appeal to the U.S. Court of Appeals, Seventh Circuit. Case No. 88-3135

3 Where an employee of the First National Bank of Chicago, Gabriel Taylor, ". . . conspired [with others] to obtain $236,000,000.00 in funds from the First National without authorization from the First National or its customers" and "participated in an unauthorized and fraudlant wire transfers of $24,375,000.00, . . . $19, 750,000.00, . . . and $25,000,000.00" from accounts of various customers of the First National Bank. U.S.A. vs. Gabriel Taylor, Case No. 88 CR 432-5, Plea Agreement

Comment (1965), and Public Finance Corp., at 90.) The supreme court recently acknowledged that "relatively immobile workers who often have no other place to market their skill" do not stand on equal footing with large corporations which employ them. (*Palmateer v. International Harvester Co.* (1981), 85 Ill.2d 124, 129, 421 N.E. 2d 876.) It is the alleged abuse of power by a large corporation over one of its front line employees which aggravates the outrageousness of conduct alleged in this case." *Milton v. Illinois Bell Telephone Co.*, 101 Ill. App. 3d 75, 79.

The state courts have ruled, thus, in retaliatory and emotional distress cases, but steadfastly refuse to recognize torts for employees of federal agencies whom are witnesses to their employers' crimes.

In quoting *re Waite*, 81 Fed. Rep. 359, this Court recognized that: "The question which marks the limit of the state jurisdiction is whether the person sought to be called to account was acting under the authority of the United States when the acts complained of were done, in and about a subject matter within Federal jurisdiction . . . for the criminal statutes of the States are not applicable to the acts done within the plane of Federal jurisdiction, and under the authority of the United States. Whenever it is made to appear in a criminal case pending in the state court that the acts charged in the indictment were done by defendant as an officer or agent of the United States in and about a matter within Federal control, . . . then it is made to appear that the state court is asked to assume a jurisdiction which it cannot rightfully exercise; and if that court entertains the case, and proceeds to adjudication the question of the extent of authority possessed by the officers of the United States, . . . testing the same provisions of state statutes, . . . it proceeds at the peril of having its jurisdiction questioned and denied." *Easton v. Iowa*, 188 US 220 at 236.

Although the basis for petitioner's complaint was one in state common law, the elements contained, therein, were crimi-

nal in nature.

The appellate court's "recognition" of the criminal activities of the First National Bank of Chicago (crimes of perjury in a Federal Court of Law, concealment of the Bank's negligent loss of customer assets and retaliation against a witness/employee) as "unavoidable aspects of employment" raises serious questions as to the extent a state court has in encouraging the continuance of such activity which the petitioner contends constitutes a detrimental intrusion by states into areas of national concern.

CONCLUSION

Employees of National Banks and Federal Savings Institutions need a clear understanding from this Court as to the role they should play in the judicial and law enforcement systems when they are witnesses to their employer's crimes.

Illinois state courts encourage the reporting of crimes as a matter of "public policy," and offer relief by tort action to citizens that are subjected to emotional harm by their employers and forced to resign by threats of discharge, but are ruling in cases involving federal agencies (National Banks and Federal Savings & Loan Associations) that the retaliatory conduct is simply "an unavoidable aspects of employment."

For the foregoing reasons urges this Honorable Court to grant certiorari.

Respectfully submitted,

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December 7, 1989